

# ATTACHMENT D

## PART 2

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY )  
AVERAGE WHOLESale PRICE )  
LITIGATION )

---

MDL No. 1456  
Civil Action No. 01-12257-PBS

**THIS DOCUMENT RELATES TO:**

Hon. Patti Saris

*United States of America ex rel. Ven-a-Care of* )  
*the Florida Keys, Inc. v. Abbott Laboratories* )  
*Inc., CIVIL ACTION NO. 06-11337-PBS* )

Magistrate Judge Marianne B. Bowler

**THE UNITED STATES' OPPOSITION TO ABBOTT LABORATORIES INC.'S  
MOTION FOR A PROTECTIVE ORDER RELATING TO THE  
DEPOSITION OF DUANE BURNHAM AND THOMAS HODGSON**

**EXHIBIT 3**

MAR 03 '97 05:55PM ABBOTT LABORATORY



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## ABBOTT LABORATORIES

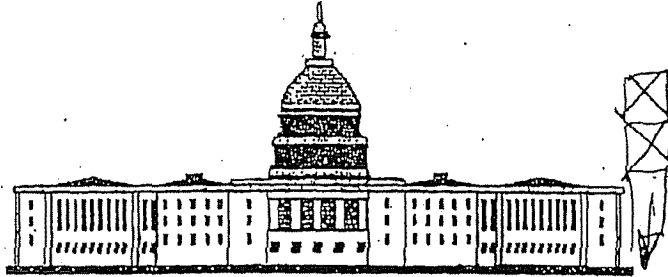
1710 Rhoda Island Avenue, N.W. #300  
Washington, DC 20036

Phone: 202/653-8524  
Fax: 202/485-8386

### FACSIMILE COVER SHEET

Case 1:01-cv-12257-PBS Document 4736-4 Filed 09/21/2007

Page 2 of 13



*AV.  
Legislative  
Language  
for  
Congress*

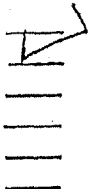
TO:

Rich Rieger

DATE:

3/3/97

FR: David W. Landside  
Cynthia Sensibaugh  
Rosemary Haas  
Sandie Preiss  
Lee Harp  
Lorna Huff



No. of Pages:

12

#### Additional Comments:

*Here is the legislative language from the President's proposal, on  
AWP, Competitive bidding and changes in payment for automated clinical  
laboratory tests. The diabetes language isn't complete so I think it is  
best not to give it out. When I get a complete version, I will send it  
out.*

*Thanks,  
Cinch*

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1/27/97 Subtitle B—Medicare Savings

SEC. 11200. CONTENTS.

The table of contents of this subtitle is as follows:

Part 1 - Provisions Relating to Part A

Subpart A - Hospitals

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Subpart C - Demonstration Concerning Working Disabled

Part 2 - Provisions Relating to Part B

Subpart A - Physicians' And Other Practitioners'

Services

Subpart B - Preventive Benefits

Subpart C - Other Provisions

Part 3 - Provisions Relating to Parts A and B

Subpart A - Beneficiary Centered Purchasing

Subpart B - Home Health Services

Subpart C - Coordination of Benefits

Subpart D - Other Provisions

Part 4 - Part B Premium

PART 1—PROVISIONS RELATING TO PART A

Subpart A—Hospitals

SEC. 11201. UPDATES FOR PPS HOSPITALS.

(a) UPDATE FACTORS.—Section 1886(b)(3)(B)(i) (42 U.S.C.

1395ww(b)(3)(B)(i)) is amended—

(1) by striking "and" at the end of subclause (XII),

and.

(2) by striking subclause (XIII) and inserting the

following:

"(XIII) for each of the fiscal years 1998 through 2002, the market basket percentage increase minus 1 percentage point for hospitals in all areas, and.

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(a) apply to services furnished on or after January 1, 2000.

(2) SUBSECTION (b).—The amendments made by subsection

(b) apply to services furnished on or after January 1, 1999.

SEC. 11234. DIAGNOSTIC INFORMATION FROM PHYSICIANS.

SEC. 11235. NO X-RAY REQUIRED FOR CHIROPRACTIC SERVICES.

(a) IN GENERAL.—Section 1861(r)(5) (42 U.S.C. 1395x(r)(5)) is amended by striking "demonstrated by X-ray to exist".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) applies to services furnished on or after January 1, 1998.

SEC. 11236. NO MARK-UP FOR DRUGS COVERED BY MEDICARE.

(a) IN GENERAL.—Section 1842(o) (42 U.S.C. 1395u(o)) is amended to read as follows:

"(o) ELIMINATION OF MARK-UP FOR DRUGS AND BIOLOGICALS.—

"(1) IN GENERAL.—If a physician's, supplier's or any other person's bill or request for payment for services includes a charge for a drug or biological for which payment may be made under this part and the drug or biological is not paid on a cost or prospective payment basis as otherwise provided in this part, the amount payable for the drug or biological shall be the lowest of—

"(A) the physician's, supplier's or other person's actual acquisition cost, as specified in paragraph (2),

"(B) the average wholesale price, as specified by the Secretary,

"(C) the median actual acquisition cost of all claims for the drug or biological for the 12-month period beginning July 1, 1998, adjusted annually and

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*Legislative language from President Clinton's  
Proposal for Pay Based on Acquisition Costs  
Subject to a Limit for Outpatient Drugs  
Prescribed in Physicians' Offices.*

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effective on January 1 of each year, and

"(D) the amount otherwise determined under this part.

"(2) ACTUAL ACQUISITION COST.--The actual acquisition cost is the physician's, supplier's or other person's cost based on the most economical case size in inventory on the date of dispensing or, if less, the most economical case size purchased within six months of the date of dispensing whether that specific drug was furnished to an individual whether or not enrolled under this part. The actual acquisition cost includes all discounts, rebates, or any other benefit in cash or in kind (including, but not limited to, travel, equipment, or free products).

"(3) BILLING RULES.--

"(A) BILL TO INCLUDE ACTUAL ACQUISITION COST.--If a physician's, supplier's or other person's bill or request for payment does not include the physician's, supplier's or other person's actual acquisition cost, no payment shall be made under this part.

"(B) BENEFICIARY PROTECTIONS.--A physician, supplier or other person may not bill an individual enrolled under this part--

"(i) any amount other than the payment amount specified in paragraph (1) and any applicable deductible and coinsurance for a drug or biological for which payment

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is made pursuant to paragraph  
(1), or

"(ii) any amount for a drug or biological for  
which payment may not be made  
pursuant to paragraph (3) (A).

"(C) PENALTIES.—If a physician, supplier or other  
person knowingly and willfully in repeated cases bills  
one or more individuals in violation of subparagraph  
(B), the Secretary may apply sanctions against such  
physician, supplier or other person in accordance with  
subsection (j) (2).

"(4) DISPENSING FEE FOR PHARMACIES.—The Secretary may  
pay a reasonable dispensing fee to licensed  
pharmacies approved to dispense drugs under this  
part."

(b) EFFECTIVE DATE.—The amendments made by subsection (a)  
apply to drugs and biologicals furnished on or after January 1,  
1998.

~~SEC. 11237. PAYMENTS TO PHYSICIAN ASSISTANTS, NURSE~~

~~PRACTITIONERS, AND CLINICAL NURSE SPECIALISTS.~~

~~(a) COVERAGE IN HOME AND AMBULATORY SETTINGS IN WHICH A  
FACILITY OR PROVIDER FEE IS NOT BILLED FOR PHYSICIAN ASSISTANTS,  
NURSE PRACTITIONERS, AND CLINICAL NURSE SPECIALISTS.—Section  
1861(s) (2) (K) (42 U.S.C. 1395x(s) (2) (K)) is amended—~~

~~(1) in clause (i)—~~

~~(A) by striking "or" at the end of subclause (II),~~

and

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(1) by striking "a fiscal year (beginning with fiscal year 1996)" and inserting "fiscal year 1996, fiscal year 1997 and for other fiscal years beginning with 2003", and

(2) by inserting after the subparagraph designation "(C)" the following: "Notwithstanding the second sentence of subparagraph (A) or the second sentence of subparagraph (B), with respect to fiscal years 1998 through 2002, the Secretary shall increase amounts for facility services by the percentage increase in the consumer price index for all urban consumers (U.S. city average) as estimated by the Secretary for the 12-month period ending with the midpoint of the year involved, reduced by two percentage points for fiscal years 1998 through 2002.".

SEC. 11252. CHANGES IN PAYMENT FOR AUTOMATED CLINICAL LABORATORY TESTS.

(a) IN GENERAL.-Section 1833(h)(2)(A)(iii) (42 U.S.C. 13951(h)(2)(A)(iii)) is amended-

(1) by striking the clause designation "(iii)" and inserting "(iii)(I)", and

(2) by adding at the end the following:

"(II) In lieu of the fees established under subclause (I), the Secretary may pay for tests classified as automated tests on the basis of a nationally uniform fee for a group of tests (of whatever number) performed together.

"(III) The Secretary shall pay for tests for amylase, apolipoprotein A, apolipoprotein B, creatine kinase, gamma glutamyl transferase, iron, lipase, magnesium, thyroxine,

*Legislative language from President Clinton's proposal for "Reforming Payment for Certain Automated Laboratory Tests"*

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triglyceride, or triiodothyronine uptake on the same basis as the Secretary pays for other tests classified as automated tests.

"(IV) The Secretary may, from time to time, reclassify specific tests as automated or not automated, based on the volume of a test and the relative frequency by which the test is performed on automated equipment."

(b) EFFECTIVE DATE AND INITIAL PAYMENT LEVELS.--

(1) The amendments made by subsection (a) apply to tests performed after 1997.

(2) If the Secretary sets a nationally uniform fee under subclause (II) of section 1833 (h)(2)(A)(iii) of the Social Security Act (42 U.S.C. 1395(h)(2)(A)(iii)), such a fee shall be initially established so that estimated aggregate payments under such fee shall equal the estimated aggregate amounts that would otherwise have been payable for the tests under subclause (1).

~~SEC. 11253. PROSPECTIVE PAYMENT SYSTEM FOR HOSPITAL OUTPATIENT  
DEPARTMENT SERVICES.~~

~~(a) IN GENERAL.—Section 1833 (42 U.S.C. 1395l) is amended by adding at the end the following:~~

~~"(c) PROSPECTIVE PAYMENT SYSTEM FOR HOSPITAL OUTPATIENT  
DEPARTMENT SERVICES.—~~

~~"(1) IN GENERAL.—With respect to hospital outpatient services designated by the Secretary and furnished during years beginning with January 1, 1999, the amount of payment made for the services determined under this part shall be determined under a prospective payment system established by~~

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the terms of the contract or applicable law) if the Secretary finds that specified outcomes are not being achieved, if the services agreed to are not being provided, or if quality standards are not being met.

"(e) INCENTIVES FOR USE OF CENTERS.—The Secretary may permit entities under a contract under this section to furnish additional services or waive beneficiary cost-sharing, subject to the approval of the Secretary.

"(f) BENEFICIARY LOCK-IN.—Individuals entitled to benefits under this title who elect to obtain services under a contract under this section may not otherwise receive benefits related to the applicable condition or need (subject to such exceptions for emergency services and as the Secretary may otherwise specify), but shall be permitted, within 30 days of a request, to discontinue participation under the contract and receive benefits as otherwise provided by this title."

~~SEC. 11263. COMPETITIVE BIDDING.~~

(a) GENERAL RULE.—Part B of title XVIII (42 U.S.C. 1395j et seq.) is amended by inserting after section 1846 the following:

"COMPETITIVE ACQUISITION OF ITEMS AND SERVICES

"SEC. 1847. (a) ESTABLISHMENT OF BIDDING AREAS.—

"(1) IN GENERAL.—The Secretary shall establish competitive acquisition areas for the purposes of awarding contracts for the furnishing under this part of the items and services described in subsection (c) after 1996. The Secretary may establish different competitive acquisition areas under this subsection for

*Legislative language from President Clinton's proposal for "Establishing Competitive Bidding for Laboratories, Durable Medical Equipment, and Other Items"*

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different classes of items and services under this part.

"(2) CRITERIA FOR ESTABLISHMENT.-The competitive acquisition areas established under paragraph (1) shall--

"(A) initially be, or be within, metropolitan statistical areas, and

"(B) be chosen based on the availability and accessibility of entities able to furnish items and services, and the probable savings to be realized by the use of competitive bidding in the furnishing of items and services in the area.

"(b) AWARDING OF CONTRACTS IN AREAS.-

"(1) IN GENERAL.-The Secretary shall conduct a competition among individuals and entities supplying items and services under this part for each competitive acquisition area established under subsection (a) for each class of items and services.

"(2) CONDITIONS FOR AWARDING CONTRACT.-The Secretary may not award a contract to any entity under the competition conducted pursuant to paragraph (1) to furnish an item or service under this part unless the Secretary finds that the entity meets quality standards specified by the Secretary for the furnishing of the item or service.

"(3) CONTENTS OF CONTRACT.-A contract entered into with an entity under the competition conducted pursuant to paragraph (1) shall specify (for all of the items and services within a class)-

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"(A) the quantity of items and services the entity shall provide; and

"(B) such other terms and conditions as the Secretary may require.

"(c) SERVICES DESCRIBED.--The items and services to which the provisions of this section shall apply are as follows:

"(1) Clinical diagnostic laboratory services.

"(2) Durable medical equipment.

"(3) Prosthetics and orthotics.

"(4) Such other items as the Secretary may specify."

(b) ITEMS AND SERVICES TO BE FURNISHED ONLY THROUGH COMPETITION ACQUISITION.--Section 1862(a)(42 U.S.C. 1395y(a)) is amended--

(1) by striking "or" at the end of paragraph (14),

(2) by striking the period at the end of paragraph (15) and inserting ";or", and

(3) by inserting after paragraph (15) the following:

"(16) where such expenses are for an item or service furnished in a competitive acquisition area (as established by the Secretary under section 1847(a)) by an entity other than an entity with which the Secretary has entered into a contract under section 1847(b) for the furnishing of such an item or service in that area, unless the Secretary finds that such expenses were incurred in a case of urgent need."

(c) REDUCTION IN PAYMENT AMOUNTS IF COMPETITIVE ACQUISITION FAILS TO ACHIEVE MINIMUM REDUCTION IN PAYMENTS.--Notwithstanding any provision of title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.), if the establishment of competitive

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acquisition areas under section 1847 of that Act (as added by this part) and the furnishing of items and services under that section during 2001 does not result in a reduction of at least 20 percent in the projected payment amounts that would apply to a class of items or services under part B of that title (42 U.S.C. 1395j et seq.) if that class of items or services were not to be furnished under that section in 2001, the Secretary shall reduce for that year the payment amounts for that class of items services (except oxygen and oxygen equipment) by the percentage the Secretary determines necessary to result in that reduction for that year (and those reduced amounts shall be considered the full payment amounts for that year in calculating payment amounts for future years).

Potential alternative default:

(c) REDUCTION IN FEE SCHEDULES IF COMPETITIVE ACQUISITION FAILS TO ACHIEVE EXPECTED SAVINGS.--

(1) Notwithstanding any provision of title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.), the Secretary shall reduce fee schedules for clinical diagnostic laboratory tests, durable medical equipment other than oxygen and oxygen equipment, and prosthetics and orthotics in all areas by 20 percent for tests furnished on or after January 1, 2001.

(2) If the Secretary has signed one or more contracts for competitive acquisition of clinical diagnostic laboratory tests in an area, the Secretary may reduce the size of the reduction specified in paragraph (1) in that area by the number of percentage points that (i) the average Medicare fee for such

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tastes or services in 1997 in the area updated by the applicable updates for 1998, 1999, 2000 and 2001 exceeds (ii) the average Medicare fee for such services for 2001 for such area.

(d) EFFECTIVE DATE.--The amendments made by subsections (a) and (b) apply to items and services furnished under part B of title XVIII of the Social Security Act (42 U.S.C. 1395j et seq. after 1997.

~~SEC. 11264. FLEXIBLE PURCHASING.~~

~~Title XVIII (42 U.S.C. 1395 et seq.) is amended by adding at the end the following:~~

~~"SEC. 1895. FLEXIBLE PURCHASING.~~

~~"(a) IN GENERAL.--The Secretary may enter into contracts with providers of services, physicians, and other entities that furnish items or services under the programs established by this title under which the Secretary may utilize--~~

~~"(1) alternative claims processing, administrative, and related procedures, and~~

~~"(2) reduced payment rates or alternative payment methodologies.~~

~~"(b) SAVINGS TO BENEFICIARIES.--Contracts under this section may provide for reductions in payments required from individuals entitled to benefits under this title.~~

~~"(c) REQUIREMENTS--Under a contract under this section--~~

~~"(1) the provisions of subtitle B of title XI (42 U.S.C. 1320c et seq.), other provisions concerned with quality of care, and conditions of participation shall apply unchanged,~~

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY )  
AVERAGE WHOLESALE PRICE )  
LITIGATION )

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MDL No. 1456  
Civil Action No. 01-12257-PBS

**THIS DOCUMENT RELATES TO:**

Hon. Patti Saris

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*the Florida Keys, Inc. v. Abbott Laboratories* )  
*Inc., CIVIL ACTION NO. 06-11337-PBS* )

Magistrate Judge Marianne B. Bowler

**THE UNITED STATES' OPPOSITION TO ABBOTT LABORATORIES INC.'S  
MOTION FOR A PROTECTIVE ORDER RELATING TO THE  
DEPOSITION OF DUANE BURNHAM AND THOMAS HODGSON**

**EXHIBIT 5**



From: David Landside *DLS*  
Divisional Vice President,  
Washington

INTEROFFICE CORRESPONDENCE

Dept: Washington Office  
202/659-8524

TO: Mark Barnak

DATE: June 20, 1997

cc: Cynthia Sensibaugh

RE: Lobbying Medicare Drug Reimbursement

-----VIA FAX-----

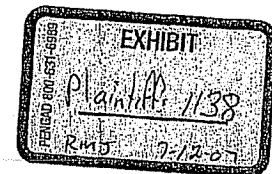
The House and Senate are expected to vote next week on the budget reconciliation bills. The bills will pass and the conference committee will begin work the week of July 7. The conference could take anywhere from 2 to 4 weeks. The Congress plans to vote on the conference bill before the August 2 start of the summer recess.

Regarding the Medicare reimbursement issue, the House has a good provision although we need to add "specific" drug or biological. The Senate provision is not good. It says:

- payment could not exceed 95% of the AWP, as specified by the Secretary
- the effective date is retroactive to May 1, 1997 (changed by a Moseley-Braun amendment from January 1, 1997)
- the amount payable is limited by an annual CPI adjustment
- an HHS study is required to determine the AWP or other appropriate price of outpatient prescription drugs which then could be used to "further adjust the payment amounts for outpatient prescription drugs.

The Senate provision also lacks the "specific" drug language.

Lupron and Calcijex benefit enormously from Medicare reimbursement. In 1994, (the last year for which I have data) the HHS allowance for TAP's Lupron was \$381.2 million, by far the largest allowance. The second largest was only \$74.3 million. HPD's Calcijex comprises 1/3 of division's profits. For these reasons, I suggest two additional lobbying actions be considered.



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First, targeted grassroots to specific conferees calling on them to support the House bill over the Senate bill. For example, Congressman Bill Archer (R-TX) will be a conferee. While he's from Houston, we could ask employees at our Texas plants in Austin and Irving to write. Or, Rep. Denny Hastert (R-IL) is a likely conferee. We could have Illinois employees write Hastert. Texas Senator Gramm (R) and Illinois Senator Moseley-Braun (D) will not be conferees but are on the Finance Committee and could be asked in letters to talk to conferees. The drawback to grassroots is that the reimbursement rate message is not a good grassroots message, although not giving the Secretary discretionary powers could be put in a letter.

Second, I suggest having Duane come to town to lobby. We would see conferees or those who could influence conferees, such as the four cited above. Our basic message would be to support the House provision. This office, in consultation with you and others, would prepare background papers.

Abbott has a lot at stake in the reimbursement fight. I do not want to feel, or having others feel, we did not do everything possible to win in conference. Duane could help. I can not get an appointment with Archer during conference. With Duane I can. A visit by him increases the importance of Abbott to the issue, which congressmen can understand. He reinforces our efforts and those of Nancy Taylor, our consultant. Nancy has done a good job—she got Senator Hatch to introduce our amendment—but a CEO adds a good deal of clout. Using Duane certainly does not guarantee success, but it increases our chances.

The downside is Duane being exposed to having to defend our position which is profit motivated. There is no way to avoid that fact. But our reasons for opposing the Senate bill are justifiable and defensible. Also he would be seeing people who are either with us (i.e. Archer who wants the House language to prevail) or are inclined to help if possible (i.e. Moseley-Braun). He is not going to see someone like Henry Waxman.

Duane's lobbied before, on 936, trade and the Clinton health bill. He is good and knows CEOs have influence on Capitol Hill. I do not know if he is available to come to Washington, but if he is, do you think he should be asked?

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ABT-DOJ 295994

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE  
LITIGATION

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) MDL No. 1456  
) Civil Action No. 01-12257-PBS  
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**THIS DOCUMENT RELATES TO:**

) Hon. Patti Saris  
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*United States of America ex rel. Ven-a-Care of*  
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*Inc.*, CIVIL ACTION NO. 06-11337-PBS


) Magistrate Judge Marianne B. Bowler  
)  
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**THE UNITED STATES' OPPOSITION TO ABBOTT LABORATORIES INC.'S  
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**EXHIBIT 8**



ABBOTT

From: David W. Landside   
Divisional Vice President  
Washington

INTEROFFICE CORRESPONDENCE

Dept: Washington Office

TO: Duane L. Burnham

DATE: June 30, 1997

VIA FAX

RE: Medicare Drug Reimbursement

The House and Senate have passed different changes to how Medicare reimburses drugs (i. e., Lupron and Calcijex). The basic change is that future reimbursement will be 95% of average wholesale price (AWP) rather than full AWP. However, the Senate bill has additional language we oppose.

- o The Senate bill makes the reimbursement rate retroactive to May 1, 1997. The reimbursement rate would be the AWP on that date. The House bill's effective date is January 1, 1998.
- o The Senate bill says that the amount reimbursed can not exceed the May 1, 1997, amount increased annually by the CPI. The House has no CPI language.
- o The Senate bill calls on the Secretary of HHS to do a study of AWP and report back to Congress within 6 months. This gets HHS looking at prices. The House bill has no such language.

I am putting together phone calls between you and Ways and Means Chairman Bill Archer (R-TX) and Congressman Denny Hastert (R-IL). Both will be House conferees when the House and Senate meet to reconcile differences. Your message to both men is simple:

- o Abbott thinks the House language providing for Medicare reimbursement of drugs at 95% of AWP, effective January 1, 1998, is much better than the Senate language. It raises \$300 million without the unnecessary Senate provisions.
- o Abbott asks that you fight to retain the House language in the conference committee and that Abbott joins you in fighting for their language.

You should also congratulate both congressmen for putting together legislation that will bring the Federal budget into balance for the first time since 1969. This was a massive undertaking and Archer and Hastert were crucial to the deal being struck.

Archer will call you. I have given his office your number. I will not know until tomorrow if Hastert will call you or if you are to call him. I will tell Debbie which way it is scheduled and get her a phone number, if necessary.

cc: Mark Barmak

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY )  
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Magistrate Judge Marianne B. Bowler

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**EXHIBIT 9**

MAR 4 1998 12:40 PM ABBOTT LABORATORIES

**ABBOTT**

Donald L. Greenham Human Laboratories  
Abbott Laboratories  
Abbott Park, Abbott Park, IL 60014-4000

August 5, 1997

The Honorable Bill Archer  
1236 Longworth House Office Building  
United States House of Representatives  
Washington, DC 20515

Dear Bill:

First, let me congratulate you for leading the effort to pass the balanced budget legislation. The tax and spending bills you passed are truly historic in importance and their passage was due, in no small part, to the many hours you personally spent putting the package together.

Second, I want to express our gratitude for what you accomplished with the Medicare drug reimbursement provision. When we spoke on the telephone you said you intended to hold the House language in the conference committee, and you did. Your language was clearly superior to the Senate's and Abbott thanks you for convincing the rest of the conferees. I know you had far bigger issues on the agenda. Taking the time to call me and discuss our concerns was greatly appreciated.

I wish you continued success in the 105th Congress.

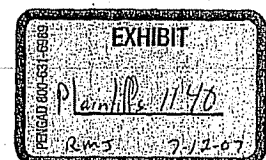
Sincerely,



DLB:par

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY )  
AVERAGE WHOLESALE PRICE )  
LITIGATION )

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) MDL No. 1456  
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) Hon. Patti Saris  
)

*United States of America ex rel. Ven-a-Care of* )  
*the Florida Keys, Inc. v. Abbott Laboratories* )  
*Inc., CIVIL ACTION NO. 06-11337-PBS* )  
)

) Magistrate Judge Marianne B. Bowler

**THE UNITED STATES' OPPOSITION TO ABBOTT LABORATORIES INC.'S  
MOTION FOR A PROTECTIVE ORDER RELATING TO THE  
DEPOSITION OF DUANE BURNHAM AND THOMAS HODGSON**

**EXHIBIT 10**

1 STATE OF NORTH CAROLINA IN THE GENERAL COURT

2 NEW HANOVER COUNTY OF JUSTICE

3 SUPERIOR COURT DIVISION

4 CONFIDENTIAL

5 HARRY E. STETSER, et al., )

6 Plaintiffs, )

7 vs. )

No. 1-CV-5268

8 TAP PHARMACEUTICAL PRODUCTS, INC., )

9 et al., )

10 Defendants. )

11  
12 The videotaped deposition of Thomas Hodgson,  
13 taken pursuant to notice in the above-entitled  
14 cause on the 19th day of February, 2004, at  
15 225 East Illinois Road, Lake Forest, Illinois, at  
16 9:00 a.m.

17  
18  
19  
20  
21  
22  
23 REPORTED BY ELVIRA M. KOKOTT

24 CERTIFIED SHORTHAND REPORTER LICENSE NO. 84-3309

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5 (Pages 14 to 17)

<p>1 deposition of Mr. Hodgson or in the litigation --  2 or in the federal litigation, and I believe that's  3 something that Mr. Haviland has -- has assented to.  4 MR. HAVILAND: I agree that the signature on  5 the agreements to abide by the protective orders in  6 Walker and Stetser does not by that signature give  7 up any rights that MDL has to claim whatever they  8 will with respect to this deposition transcript.  9 It's simply to make clear that counsel in MDL has  10 agreed to be bound by the protective orders in the  11 cases for which this deposition has been noticed.  12 I am going to hand the court reporter now  13 the agreement signed by counsel for the MDL in  14 Stetser as Hodgson Exhibit 1A and Walker as Hodgson  15 Exhibit 1B.  16 (Whereupon, Hodgson Deposition  17 Exhibit Nos. 1A-1B were marked for  18 identification as of 2/19/04.)  19 MR. PORCELLI: Mr. Haviland, now that the  20 preliminaries are out of the way, and it appears  21 this deposition will be going forward in both the  22 Walker and the Stetser cases, I would like to  23 restate that I am here on behalf of Takeda in the  24 Walker case only, pursuant to the North Carolina</p>	14	<p>1 Q. Can you tell me where you presently live,  2 sir.  3 A. 1015 Ashley Road, Lake Forest, Illinois.  4 Q. And, for how long have you lived in  5 Lake Forest, Illinois?  6 A. Approximately, I would say about 25 years.  7 Q. And, you understand that you're appearing  8 today to give deposition testimony in the two cases  9 I referenced?  10 A. I do.  11 Q. Do you also understand that you're  12 appearing today not only in your individual  13 capacity, but also as a corporate designee on  14 behalf of Abbott Laboratories?  15 A. Yes.  16 Q. Okay. Can you tell me when you first  17 learned that you would be appearing today as a  18 corporate designee on behalf of Abbott?  19 A. Specifically this date or generally?  20 Q. Just generally.  21 A. I think I was aware of it some time last  22 year.  23 Q. All right. Can you tell me what your  24 understanding was then in terms of what role you</p>	16
<p>1 Appellate Court's February 3rd ruling in the  2 Stetser case.  3 MR. HAVILAND: I don't know that that requires  4 a response of plaintiff's counsel. Counsel is here  5 appearing in one case. What is happening in  6 Stetser in the Appellate Courts is happening in  7 Stetser in the Appellate Courts.  8 Any other preliminaries? Okay.  9 Thomas Hodgson,  10 called as a witness herein, having been first duly  11 sworn, was examined and testified as follows:  12 EXAMINATION  13 BY MR. HAVILAND:  14 Q. Mr. Hodgson, my name is Don Haviland, I  15 am counsel for the plaintiff in the class in a case  16 that's been certified as a national class action in  17 North Carolina State Court.  18 I am also counsel for plaintiffs in a  19 class that's been certified in New Jersey State  20 Court.  21 I would like you to start by please  22 telling the court reporter and the jury in this  23 case your full name.  24 A. Thomas R. Hodgson.</p>	15	<p>1 would be playing on behalf of Abbott at the  2 deposition today?  3 A. I didn't have a very clear understanding  4 at that point, I do now.  5 Q. Okay. Could you tell me what your  6 understanding is today?  7 A. My understanding today is that there are  8 certain points that were raised, and I am to cover  9 those points.  10 Q. Okay. Could you tell me what those points  11 are as you know them today?  12 A. Basically, Abbott's relationship to TAP,  13 the various business practices of TAP, and Abbott's  14 knowledge of those previous practices.  15 Q. Anything else?  16 A. That's, basically, my understanding.  17 There may be more points, but my overall  18 understanding is that I am to testify relative to  19 Abbott's relationship to TAP.  20 Q. Okay. And, can you tell me in greater  21 detail what your understanding of what the  22 testimony is you can provide today with respect to  23 that topic?  24 MS. RUSSO: Objection, form.</p>	17

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57 (Pages 222 to 225)

<p style="text-align: right;">222</p> <p>1 these tactical elements.</p> <p>2 Q. One of the subjects you have been asked to</p> <p>3 testify on behalf of Abbott, too, has to deal with</p> <p>4 marketing and sales programs, and so I just want to</p> <p>5 explore the depth of your knowledge.</p> <p>6 A. No, I understand.</p> <p>7 Q. And beyond any --</p> <p>8 A. And, I didn't have a lot of knowledge, and</p> <p>9 if I didn't have the knowledge, nobody would have</p> <p>10 the knowledge, because I was closest to it. The</p> <p>11 fact of the matter was this was an independent</p> <p>12 company. Abbott was not involved in the detail</p> <p>13 nitty-gritty operations of this company.</p> <p>14 Q. Did -- do you recall if at any time at a</p> <p>15 board meeting did anyone from TAP present</p> <p>16 specifically on issues relating to educating</p> <p>17 doctors about the business aspects of Lupron?</p> <p>18 A. I don't remember the specifics.</p> <p>19 Q. In general, prior to board meetings, did</p> <p>20 you receive any documents from anyone at TAP to</p> <p>21 prepare for the board meetings?</p> <p>22 A. No, but I, as I said, because typically we</p> <p>23 were heavily involved in the plan and update</p> <p>24 process, I had a pretty good understanding of the</p>	<p style="text-align: right;">224</p> <p>1 July 11, 1994.</p> <p>2 Do you see in the first paragraph you're</p> <p>3 listed as an attendee? And, do you have any reason</p> <p>4 to believe you're not at this meeting?</p> <p>5 A. No, I know I was at this meeting.</p> <p>6 Q. Okay. How do you know you were at this</p> <p>7 one?</p> <p>8 A. Because I remember playing golf with</p> <p>9 Mr. Morita.</p> <p>10 Q. Did you play skins?</p> <p>11 A. No, but he took nine shots to get out of</p> <p>12 the sand trap.</p> <p>13 Q. That Pebble Beach course was a hard one,</p> <p>14 huh?</p> <p>15 A. I said use your hand wedge, pal. Let's</p> <p>16 move on.</p> <p>17 Q. Mr. Hasegawa now as the president</p> <p>18 conducted the agenda of the meeting, and in the</p> <p>19 fourth paragraph he indicates that he outlined what</p> <p>20 he deemed critical factors for 1994, 1995. And,</p> <p>21 then, he says, prepare a contingency plan for</p> <p>22 Lupron depot 7.5 milligram in the face of changes</p> <p>23 to the Medicare program.</p> <p>24 Do you have any recollection as to what,</p>
<p style="text-align: right;">223</p> <p>1 overall operation and what was going to be proposed</p> <p>2 in terms of plans, financials and so forth.</p> <p>3 Q. Okay. So, you had some knowledge going in</p> <p>4 what was going to be discussed?</p> <p>5 A. I did because of my interface role as did</p> <p>6 Kunio Takeda.</p> <p>7 Q. Okay. So, there were no periodic</p> <p>8 documents, to your knowledge, prepared for</p> <p>9 Mr. Burnham, Mr. Konishi, and others at the board</p> <p>10 in advance of board meetings?</p> <p>11 A. I don't recall any. In -- in specific</p> <p>12 situations where, for example, the Syntex patent</p> <p>13 buyout issue, that wasn't handled within the</p> <p>14 context of a board meeting, because we typically</p> <p>15 only met once or twice a year. And, Burnham and</p> <p>16 Konishi or Morita would have been briefed by myself</p> <p>17 and Kunio Takeda respectively on those issues.</p> <p>18 (Whereupon, Hodgson Deposition</p> <p>19 Exhibit No. 21 was marked for</p> <p>20 identification as of 2/19/04.)</p> <p>21 BY MR. HAVILAND:</p> <p>22 Q. Mr. Hodgson, I am showing you what I've</p> <p>23 marked as Hodgson Exhibit 21, the minutes of the</p> <p>24 meeting of the board of directors of TAP for</p>	<p style="text-align: right;">225</p> <p>1 in light of the fact that Pebble Beach comes to</p> <p>2 mind, whether or not you recall what the Medicare</p> <p>3 changes or the contingency plan were that</p> <p>4 Mr. Hasegawa described?</p> <p>5 A. Well, this says prepare contingency plan,</p> <p>6 so I don't know if one actually was prepared or</p> <p>7 not. But I think at this point in time, roughly,</p> <p>8 we had Hillary Clinton doing her thing in terms of</p> <p>9 reformation of the entire health care system. And,</p> <p>10 I think at the same time there was some discussions</p> <p>11 and analyses under way at HCFA relative to</p> <p>12 reimbursement and alternate forms of reimbursement</p> <p>13 of drugs prescribed in physician offices.</p> <p>14 Q. Do you recall that HCFA was looking at the</p> <p>15 alternative of reimbursing on straight acquisition</p> <p>16 cost at that time?</p> <p>17 A. I think that was one option. Another</p> <p>18 option was steeper discount off AWP, and there were</p> <p>19 probably three or four other options that I don't</p> <p>20 recall or maybe nobody knows about.</p> <p>21 Q. Do you recall what was discussed with TAP</p> <p>22 either between TAP and the board or TAP and you</p> <p>23 specifically in this time frame with respect to</p> <p>24 what TAP should do to prepare for those eventual</p>

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64 (Pages 250 to 253)

<p>1 A. No. I didn't get into this kind of 2 detail. 3 Q. Did you know that TAP had engaged a 4 company to assist it on reimbursement issues with 5 physicians? 6 MS. RUSSO: Objection, form. 7 THE WITNESS: On reimbursement issues with 8 physicians? To represent it vis-a-vis whom? 9 BY MR. HAVILAND: 10 Q. Well, I was looking on the document for -- 11 I think there was a page missing. 12 Did you ever hear of a company called 13 Rescon Reimbursement Consultants? 14 A. No. 15 Q. Did you know that TAP had a -- did you 16 ever hear of a company called discovery 17 international? 18 A. No. 19 Q. Did you know that TAP had engaged either 20 of those companies to work with TAP on these 21 consultant programs? 22 A. No. 23 MS. RUSSO: Object to the form. 24 (Whereupon, Hodgson Deposition</p>	<p>250 1 Do you know why it is Mr. MacKenzie deemed 2 changes in Medicare reimbursement a threat to TAP? 3 MR. BUCHMAN: Object to the form. 4 THE WITNESS: I don't know specifically what 5 was in his mind. Obviously, any time you have 6 something as significant as reimbursement changes, 7 marketing and salespeople are concerned. 8 BY MR. HAVILAND: 9 Q. In the memorandum, he talks about the HCFA 10 enforcing OBRA 89 estimated acquisition cost policy 11 for drugs paid by Medicare. And, he reports, the 12 current status is health care finance 13 administration, HCFA, and the office of management 14 and budget, OMB, are having difficulty agreeing on 15 survey methodology to establish estimated 16 acquisition cost. 17 Skip down. He says, for the short term 18 '95 and '96, AWP reimbursement seems safe. 19 Did you know then or do you know now that 20 the HCFA, H-C-F-A, and OMB, were attempting to 21 survey acquisition costs of physicians for Lupron? 22 A. I knew that, as we discussed earlier, that 23 HCFA was considering a number of alternatives to 24 AWP reimbursement. In terms of how they were</p>
<p>251 1 Exhibit No. 27 was marked for 2 identification as of 2/19/04.) 3 BY MR. HAVILAND: 4 Q. Mr. Hodgson, I am showing you what I 5 marked as Hodgson Exhibit 27, memorandum dated 6 September 6, 1995, from Mr. Alan MacKenzie to 7 Yasu Hasegawa and Mr. Patton. 8 You're not listed as a recipient, but in 9 the first paragraph, after the subject, it says, 10 HCFA reimbursement update and current action plans. 11 Mr. MacKenzie writes, Yasu, per our recent 12 discussion, I wanted to update you, Tom Hodgson, 13 and Kunio Takeda on the current status of any 14 threats to Medicare reimbursement policy for Lupron 15 depot. 16 Let me first ask you, do you recall in 17 1995 having a discussion with Mr. Takeda and/or 18 Mr. Hasegawa about reimbursement? 19 A. No. 20 Q. All right. Mr. MacKenzie sets forth here, 21 he says, I wanted to review our direct consumer 22 campaign we are piloting in response to the 23 changing reimbursement landscape. And, then, he 24 goes on to say, first a review of the threats.</p>	<p>253 1 actually pursuing that, I wasn't aware, other than, 2 obviously, I got this memo or I was briefed on it. 3 So, at that time, I was, obviously, aware that they 4 were doing a survey. 5 Q. Do you know what the results of the survey 6 were, or do you know if, in fact, the survey was 7 actually concluded? 8 A. I don't know. 9 Q. Did you ever have occasion to speak to 10 anyone at the American Urological Association? 11 A. No. Oh, you mean a representative of -- 12 Q. Yes. 13 A. -- the association? 14 No, not that I know of. I have met a few 15 doctors, but I don't think they were members. I 16 don't think they were in the executive management 17 of the AUA. That's what you really mean, right? 18 Q. Yes. 19 A. People employed by the trade association. 20 Q. Correct. 21 A. Yes. Not to my knowledge. 22 Q. Did you know that TAP individuals had 23 contacts with individuals at AUA? 24 A. Yes, because that would have been part of</p>

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESAL PRICE  
LITIGATION

---

)  
)  
) MDL No. 1456  
) Civil Action No. 01-12257-PBS  
)

**THIS DOCUMENT RELATES TO:**

) Hon. Patti Saris  
)

*United States of America ex rel. Ven-a-Care of*  
*the Florida Keys, Inc. v. Abbott Laboratories*  
*Inc.*, CIVIL ACTION NO. 06-11337-PBS

) Magistrate Judge Marianne B. Bowler  
)  
)  
)

**THE UNITED STATES' OPPOSITION TO ABBOTT LABORATORIES INC.'S  
MOTION FOR A PROTECTIVE ORDER RELATING TO THE  
DEPOSITION OF DUANE BURNHAM AND THOMAS HODGSON**

**EXHIBIT 11**

Lupron Marketing and  
Sales Practices LitigationThomas Richard Hodgson  
February 20, 2004

1	IN THE UNITED STATES DISTRICT COURT	1	APPEARANCES (Continued)	3
2	FOR THE DISTRICT OF MASSACHUSETTS	2		
3		3	Also Present:	
4	IN RE: MDL No. 1430	4	John D'Andrea, Videotape Specialist	
5	LUPRON MARKETING AND SALES	5		
6	PRACTICES LITIGATION Master File No.	6		
7	01-CV-10881	7		
8	THIS DOCUMENT RELATES TO Judge:	8		
9	ALL ACTIONS Richard Stearns	9		
10		10		
11	CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER	11		
12		12		
13	VIDEOTAPED 30(b)(6) DEPOSITION of Abbott	13		
14	Laboratories through its representative THOMAS	14		
15	RICHARD HODGSON, taken in the hereinbefore-	15		
16	entitled action, taken before Rebecca L.	16		
17	Stonerock, at the Deerpath Inn, Windsor Hall II,	17		
18	255 East Illinois Road, Lake Forest, Illinois,	18		
19	on February 20, 2004, commencing at 8:10 a.m.	19		
20	pursuant to notice,	20		
21		21		
22	JOSEPH ALBANESE & ASSOCIATES	22		
23	Certified Shorthand Reporters	23		
24	805 Main Street	24		
25	Toms River, New Jersey 08753	25		
	Telephone (732) 244-6100			
	Fax (732) 288-8318			
1	APPEARANCES:	1	INDEX	4
2	SPECTOR, ROSEMAN & KODROFF	2	NAME OF WITNESS DIRECT CROSS REDIR. RECRO	
3	1818 Market Street, Suite 2500	3	THOMAS RICHARD HODGSON	
4	Philadelphia, Pennsylvania 19103	4	by Mr. Macorella 9	
5	BY: JOHN A. MACORETTA	5		
6	Attorneys for Plaintiffs	6		
7	HAGENS BERMAN	7	HODGSON EXHIBITS	
8	225 Franklin Street, 28th Floor	8	No. Description Page	
9	Boston, Massachusetts 02210	9	1 Notice of Rule 30(b)(6) Deposition 20	
10	BY: EDWARD NOTARGIACOMO	10	2 Bates Nos. TAP 2045888 - 709 30	
11	Attorneys for Plaintiffs	11	3 Bates Nos. TAP 1047928 - 931 42	
12	MCDERMOTT, WILL & EMERY	12	4 Bates Nos. TAP 2013907 - 912 56	
13	227 West Monroe Street	13	5 Bates Nos. TAP 2007748 70	
14	Chicago, Illinois 60608-5098	14	6 Bates Nos. TAP 2007810 - 812 72	
15	BY: JOSHUA T. BUCHMAN	15	7 Bates Nos. TAP 1003798 - 801 74	
16	Attorneys for Defendant	16	8 Bates Nos. TCI 001834 - 936 77	
17	Abbott Laboratories	17	9 Bates Nos. TAP 2018812 82	
18	ABBOTT LABORATORIES	18	10 Bates Nos. TAP 00045096 83	
19	Department 324, Building AP6D	19	11 Bates Nos. TAP 2012082 109	
20	100 Abbott Park Road	20	12 Bates Nos. TAP 2086248 - 250 112	
21	Abbott Park, Illinois 60084-3500	21	13 Bates Nos. TAP 2086854 - 855 123	
22	BY: CATHERINE MCCAIN	22	14 Bates Nos. TCI 001420 - 423 127	
23	In-House Counsel for Abbott Laboratories	23	15 Bates Nos. TAP 8003431 - 434, 8003421 141	
24	JONES, DAY, REAVIS & POGUE	24	16 Bates Nos. TAP 00063741 - 742 144	
25	77 West Wacker Drive	25	17 Bates Nos. TAP 2011336 - 352 149	
	Chicago, Illinois 60601-1692		18 Bates Nos. ABT 02903 - 919 152	
	BY: LEE ANN RUSSO			
	Attorneys for Defendants TAP			
	Pharmaceutical Products, Inc.			
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	One IBM Plaza			
	Chicago, Illinois 60611-7803			
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	Attorneys for Defendants Takeda			
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	Takeda America Holdings, Inc.			
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	35 West Wacker Drive			
	Chicago, Illinois 60601-9703			
	BY: ROBERT L. MICHELS			
	Attorneys for Witness Thomas Hodgson			

ALBANESE &amp; ASSOCIATES

732-244-6100

(1) Page 1 to Page 4

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Lupron Marketing and  
Sales Practices Litigation

Thomas Richard Hodgson  
February 20, 2004

<p>13</p> <p>1 Q Okay. You've heard the term</p> <p>2 "average wholesale price" in connection with</p> <p>3 drug pricing?</p> <p>4 A Yes.</p> <p>5 Q Could you tell me what you</p> <p>6 understand that term to mean?</p> <p>7 A It's the definition that is developed by</p> <p>8 the Red Book based on inputs from pharmaceutical</p> <p>9 companies.</p> <p>10 Q Okay. What is that definition?</p> <p>11 Do you know?</p> <p>12 A It's a markup on the wholesaler</p> <p>13 acquisition price or cost.</p> <p>14 Q And what is -- could you tell me</p> <p>15 what "wholesaler acquisition cost" means?</p> <p>16 A It's the average price that the</p> <p>17 wholesaler would pay to the pharmaceutical</p> <p>18 company.</p> <p>19 Q To purchase the drug in question?</p> <p>20 A To purchase the drug in question.</p> <p>21 Q Now, that definition that you just</p> <p>22 gave me of AWP, was that the definition that was</p> <p>23 used by TAP when discussing AWP?</p> <p>24 A I don't know what definition they used.</p> <p>25 I didn't get into that degree of detail with</p>	<p>15</p> <p>1 A It's -- it's one. I don't know if there</p> <p>2 are others that publish it or not. That's the</p> <p>3 one I'm familiar with.</p> <p>4 Q Okay. And you would agree that</p> <p>5 AWP is used as a basis for reimbursement by</p> <p>6 certain private insurers, wouldn't you?</p> <p>7 A Yes.</p> <p>8 MS. RUSSO: Objection, form.</p> <p>9 Q And you'd agree that AWP is used</p> <p>10 as a basis for reimbursement by Medicare as</p> <p>11 well, wouldn't you?</p> <p>12 A Yes.</p> <p>13 Q What -- what do you understand the</p> <p>14 term "list price" to mean?</p> <p>15 A In what context?</p> <p>16 Q In the context of a list price for</p> <p>17 Lupron.</p> <p>18 A I didn't use that terminology.</p> <p>19 Q Okay. How about the term "direct</p> <p>20 price"? Have you ever heard that terminology?</p> <p>21 A No.</p> <p>22 Q Did TAP have something equivalent</p> <p>23 to a list price for Lupron?</p> <p>24 MR. BUCHMAN: Object to the form.</p> <p>25 A I believe they had a wholesaler</p>
<p>14</p> <p>1 them.</p> <p>2 Q Okay. How about Abbott? Did</p> <p>3 Abbott have some definition of AWP?</p> <p>4 A I wasn't aware of any particular</p> <p>5 definition of it.</p> <p>6 Q Well, an AWP was published for</p> <p>7 Abbott drugs as well, correct?</p> <p>8 A That's correct.</p> <p>9 Q Okay. Do you have any knowledge</p> <p>10 as to how Red Book creates -- or calculates AWP?</p> <p>11 A Broadstroke-wise I do. Basically they</p> <p>12 take the wholesaler acquisition cost and mark it</p> <p>13 up by a percentage.</p> <p>14 Q Do you know how that percentage is</p> <p>15 chosen for the markup?</p> <p>16 A No, I don't.</p> <p>17 Q Okay. Do you know if that</p> <p>18 percentage is given to Red Book by the</p> <p>19 pharmaceutical company?</p> <p>20 A I don't believe it is, but I'm not</p> <p>21 familiar or in any way conversant with what the</p> <p>22 Red Book does.</p> <p>23 Q Okay. And when we say "Red Book,"</p> <p>24 that's one of several industry compendia that</p> <p>25 publishes an AWP; is that correct?</p>	<p>16</p> <p>1 acquisition cost type of price.</p> <p>2 Q How did TAP calculate the</p> <p>3 wholesaler acquisition cost for Lupron?</p> <p>4 A I don't know.</p> <p>5 MS. RUSSO: Objection, form.</p> <p>6 A I didn't get into those details.</p> <p>7 Q But that's -- we can agree that</p> <p>8 that's a number that TAP would generate</p> <p>9 internally, correct?</p> <p>10 A Correct.</p> <p>11 Q Okay. How was wholesale</p> <p>12 acquisition price calculated for drugs by</p> <p>13 Abbott?</p> <p>14 MR. BUCHMAN: Object. Object to</p> <p>15 this witness testifying as to drugs other than</p> <p>16 Lupron.</p> <p>17 Q You can answer the question.</p> <p>18 A I don't know because I didn't get into</p> <p>19 that degree of detail. That kind of detail was</p> <p>20 multiple levels of staff below where I operated.</p> <p>21 Q So you don't know if there was a</p> <p>22 companywide policy or formula for how WAC is</p> <p>23 going to be calculated at Abbott?</p> <p>24 A I don't know if there was a company-wide</p> <p>25 formula, no.</p>



Lupron Marketing and  
Sales Practices Litigation

Thomas Richard Hodgson  
February 20, 2004

<p>97</p> <p>1 MR. BUCHMAN: Objection.</p> <p>2 A I don't believe that the economics of the</p> <p>3 proposition were the driving force for the --</p> <p>4 for the product marketing strategy. I think</p> <p>5 that the critical aspect of Lupron was that it</p> <p>6 was a very innovative product and it provided</p> <p>7 the physician with a form of therapy which was</p> <p>8 truly a breakthrough.</p> <p>9 Q And when we say -- and when you</p> <p>10 say "the economics," you're talking about the</p> <p>11 economics to the physician?</p> <p>12 A Yes.</p> <p>13 Q Okay. And when you don't say --</p> <p>14 when you say you don't believe that was a</p> <p>15 driving force, you're talking about from</p> <p>16 whenever the one-month came on up through the</p> <p>17 present?</p> <p>18 MS. RUSSO: Objection to form.</p> <p>19 A I -- I believe physicians make judgments</p> <p>20 relative to therapy based on what's in the best</p> <p>21 interests of the patient. I think that's their</p> <p>22 primary focus.</p> <p>23 Q Okay. Would you agree with me</p> <p>24 that at certain points one of the ways TAP</p> <p>25 marketed to Lupron -- marketed Lupron to</p>	<p>99</p> <p>1 the medical community of prostate cancer and the</p> <p>2 ways to diagnose it, and number two, to -- to</p> <p>3 recommend Lupron as an innovative therapy. I</p> <p>4 think the business aspects were secondary to</p> <p>5 most physicians. Perhaps not all.</p> <p>6 Q Okay. So do you know if TAP made</p> <p>7 marketing materials available to the sales</p> <p>8 representatives that talked about the business</p> <p>9 aspects of Lupron?</p> <p>10 A I know that at one point in time that the</p> <p>11 TAP representatives had computers -- laptop</p> <p>12 computers and computer systems that would show</p> <p>13 the economic aspects of the physician</p> <p>14 prescribing the drug.</p> <p>15 Q Okay. And that was a computer</p> <p>16 program created by somebody at TAP or for TAP,</p> <p>17 correct?</p> <p>18 A Yes.</p> <p>19 Q Okay. So at least in that</p> <p>20 instance TAP made an effort to market Lupron by</p> <p>21 talking about how much money the physician could</p> <p>22 make?</p> <p>23 MR. BUCHMAN: Objection to the</p> <p>24 form of the question.</p> <p>25 A Well, you keep talking about marketing</p>
<p>98</p> <p>1 physicians was by demonstrating to the</p> <p>2 physicians how much money they could make by</p> <p>3 prescribing Lupron?</p> <p>4 MS. RUSSO: Objection, form.</p> <p>5 A I don't think that was a stress of their</p> <p>6 marketing effort. I think that as part of their</p> <p>7 dialogue with the physician relative to the</p> <p>8 reimbursement process, the subject of economics</p> <p>9 may or may not have come up. And in that</p> <p>10 context they would have dealt with it.</p> <p>11 Q Okay. So you would agree that --</p> <p>12 all right. I understand that it wasn't the</p> <p>13 thrust of the marketing effort and I'm not</p> <p>14 asking you what percentage of marketing related</p> <p>15 to one or the other. I'm asking you did TAP</p> <p>16 ever, to your knowledge, make any efforts to</p> <p>17 market Lupron based on profit to the physicians.</p> <p>18 A Not based on profit to physicians. As I</p> <p>19 said, there was a business aspect to it that</p> <p>20 they would discuss with the physician. They</p> <p>21 would point out to the physician, if they asked,</p> <p>22 what the economics were.</p> <p>23 I don't think that was the principal</p> <p>24 thrust. I think the principal thrust, as I said</p> <p>25 before, was, number one, creating awareness in</p>	<p>100</p> <p>1 and I keep trying to direct you to what I think</p> <p>2 the principal thrust of the marketing was. That</p> <p>3 was an element of it, but I don't think it was a</p> <p>4 major element.</p> <p>5 Q I understand that.</p> <p>6 A Okay.</p> <p>7 Q And by the way, so we get to -- to</p> <p>8 terminology, would you agree with me that --</p> <p>9 well, let me try it this way: The term "return</p> <p>10 to practice," what do you understand that to</p> <p>11 mean?</p> <p>12 A I understand it to mean contribution to</p> <p>13 the overhead of a physician's practice.</p> <p>14 Q How about the spread on Lupron?</p> <p>15 What do you understand that to mean?</p> <p>16 A I understand that to mean the difference</p> <p>17 between the acquisition cost or price to the</p> <p>18 physician and what he was reimbursed.</p> <p>19 Q Okay. And understanding that you</p> <p>20 don't think that this was a thrust of the</p> <p>21 marketing effort, when TAP made any marketing</p> <p>22 effort to talk about profit to the physician, is</p> <p>23 that referred to internally as "marketing the</p> <p>24 spread"?</p> <p>25 MR. BUCHMAN: Object to the form</p>

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Sales Practices Litigation

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<p style="text-align: right;">225</p> <p>1 call the "spread," what you would call 2 "contribution to overhead" -- 3 A Uh-huh. 4 Q -- and I think we agreed 5 earlier -- tell me if I'm wrong -- that what 6 we're talking about is the difference between 7 what a physician pays for the drug and the 8 amount he is reimbursed for the drug. 9 A Yes. 10 Q Okay. And as to Lupron, would you 11 agree that TAP could make that amount bigger by 12 reducing the amount it charges the physician for 13 the drug? 14 MS. RUSSO: Objection, form. 15 A By reducing their price. 16 Q Yes. 17 A Yes. 18 Q Okay. Either directly or through 19 some form of discount or rebate? 20 A Yes. 21 Q Okay. That's regardless -- and 22 TAP could do that, could lower the bottom half 23 of what we're calling -- what I'll call your 24 contribution to overhead, TAP could lower the 25 bottom half in that irrespective of what</p>	<p style="text-align: right;">227</p> <p>1 this says you were at the meeting? 2 A Yes. 3 Q Have no reason to think that's 4 wrong, right? 5 A Right. 6 Q Okay. I'm looking at the, 7 "Mr. Pietraszek presented" -- third paragraph, 8 "Mr. Pietraszek presented his Executive 9 Overview," "cited 1991 TAP highlights and TAP's 10 1992 challenges." There's a list of challenges. 11 The next-to-last line says, "expansion of 12 patient reimbursement program." What does that 13 mean? 14 A I don't know. I think it's a typo. 15 Q Which part's the typo? 16 A We weren't reimbursing patients. 17 Q I didn't think so. So you think 18 that should say, "physician reimbursement 19 program"? 20 A And I -- I don't -- I really don't know 21 what it is because we didn't reimburse 22 physicians either. So I think that whoever 23 wrote this was confused and I have no idea what 24 this really means. 25 Q I'll give you a chance to take</p>
<p style="text-align: right;">226</p> <p>1 happened to the top number, right? I mean, 2 regardless of whether or not the top number, 3 meaning the reimbursement, goes up, down or 4 stays the same, TAP had the ability to lower the 5 bottom half? 6 MR. BUCHMAN: Object to form. 7 A Through the -- the ways that we 8 discussed. 9 Q Let me show you -- I want to chat 10 with you for a few minutes about some of the 11 Board of Directors minutes. I'm going to 12 start -- we'll mark this number 35. I'm going 13 to start with the -- I'm going to start with the 14 October 15, '91 Board of Directors minutes. 15 (Discussion off the record.) 16 (HODGSON Exhibit Number 35 was marked for 17 identification.) 18 Q Now, at this time, October '91, 19 the board was meeting twice a year, do you 20 recollect, or -- 21 A I believe they were. 22 MR. BUCHMAN: What did you mark 23 this, 35? 24 MR. MACORETTA: Yes. 25 Q And I'm looking at the third --</p>	<p style="text-align: right;">228</p> <p>1 that back when we turn to the last page and we 2 see Maureen McShane is the secretary who wrote 3 the minutes. 4 A Well, she could have been confused. 5 Q Okay. 6 A Because I don't know what it means. 7 Patient reimbursement, clearly patients weren't 8 being reimbursed. And we weren't reimbursing 9 anybody. So -- 10 Q Okay. And obviously had somebody 11 stood up at the Board of Directors meeting and 12 talked about patient reimbursement, you would 13 have said, "What are you talking about?" 14 A Exactly. Now, I can speculate what -- 15 what was really being discussed here. 16 Q I understand you're speculating, 17 but go ahead. 18 A I think he was really talking about 19 expansion of the program whereby we assisted 20 physicians in working their way through the 21 laborious process of -- of obtaining 22 reimbursement. That's what I think this means. 23 Because it clearly doesn't mean what the words 24 say. 25 Q Okay. And that was an effort that</p>